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## WISCONSIN LEGISLATIVE COUNCIL RULES CLEARINGHOUSE

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### CLEARINGHOUSE RULE 19-093

#### Comments

**[NOTE: All citations to “Manual” in the comments below are to the Administrative Rules Procedures Manual, prepared by the Legislative Reference Bureau and the Legislative Council Staff, dated December 2014.]**

#### 1. Statutory Authority

a. It is unclear that the agency possesses sufficient statutory authority to promulgate certain provisions of this proposed rule.

An agency must promulgate as a rule any interpretation that the agency specifically adopts to govern its enforcement or administration of a statute. [s. 227.10 (1), Stats.] A “rule” means a “regulation, standard, statement of policy, or general order of general application which has the effect of law and which is issued by an agency to implement, interpret, or make specific legislation enforced or administered by the agency or to govern the organization or procedure of the agency”. [s. 227.01 (13) (intro.), Stats.]

Under s. 281.15 (1), Stats., the agency is required to promulgate rules setting standards of water quality for the waters of the state. The statute contemplates that different standards may be required for different waters or portions thereof.

In response to that statutory mandate, the agency has promulgated rules setting water quality criteria for phosphorus, including statewide criteria for different types of water bodies. [s. NR 102.06 (1) to (6).] Those rules further acknowledge that any of the criteria may be modified *by rule* for a specific water body or segment (“site-specific criterion”). [s. NR 102.06 (7).]

Clearinghouse Rule 19-093, in part, creates ch. NR 119, which establishes a process whereby the agency may establish a site-specific criterion *without* the promulgation of a new rule in some circumstances. [See, in particular, proposed s. NR 119.07 (4) (a).] Under the proposed

rule, a site-specific criterion established under ch. NR 119 “becomes the applicable water quality criterion under s. 281.15, Stats., for the approved waterbody or segment”. Under proposed s. NR 119.07 (4) (a), such criteria may take effect upon publication on the agency’s website, and without specific rulemaking following the procedures of ch. 227, Stats. Setting a site-specific criterion in this manner could be characterized as prescribing a “standard ... which has the effect of law and which is issued ... to ... interpret ... specific legislation” within the statutory definition of a “rule”. This is especially true in light of s. NR 102.06 (7), which states that such site-specific criteria may be implemented by rule. Given the requirement under s. 281.15 (1), Stats., that these criteria shall be established by rule, it is unclear that the agency has the authority to promulgate a rule relieving itself of the rulemaking obligation for future site-specific criteria.

It is also worth noting that agency actions relating to implementing, interpreting, or administering variances of a phosphorus standard for certain sources of water pollution are excluded from the definition of “rule”. [s. 227.01 (13) (yt), Stats.] The setting of those phosphorus standards, whether statewide or site-specific, however, is not excluded from the definition of “rule”.

## **2. Form, Style and Placement in Administrative Code**

a. In proposed s. NR 119.04 (1), the internal cross-reference to “this paragraph” should instead be to “this subsection”.

b. Under proposed s. NR 119.06 (intro.), the agency is authorized to develop a site-specific criterion on its own initiative as an alternative to responding to a request. The agency should review the remainder of the proposed rule to clarify whether various procedures associated with responding to a request also apply to an agency-initiated action. For example, proposed s. NR 119.07 (3) requires a technical support document and a public comment and hearing if the agency determines that a requested site-specific criterion may be approvable. Are those actions required if the agency determines that an agency-initiated site-specific criterion may be approvable?

c. The same two notes appear following proposed s. NR 119.07 (2) and (4) (b). Was this intentional? It is not incorrect in either place, but its inclusion under sub. (2) might suffice. In any event, the agency may want to replace “any person” in each note with a more general phrase, such as “a relevant party” or “a qualifying person”. Under s. 227.12, Stats., a petition for rulemaking may be initiated by a municipality, certain associations, or any five or more persons, but not by “any person”.

## **3. Conflict With or Duplication of Existing Rules**

a. As discussed in Section 1. a., above, existing s. NR 102.06 (7) provides that a site-specific criterion may be established by rule. The proposed ch. NR 119, on the other hand, establishes a process whereby the agency may establish a site-specific criterion without the promulgation of a rule in some circumstances. Therefore, these two provisions may conflict. Depending on intent, one of the following suggestions could be considered to remove the conflict:

- (1) If, on the one hand, the ch. NR 119 process is intended to be the exclusive means by which a site-specific criteria may be established, in s. NR 102.06 (7) the first

sentence should be revised to remove the allusion to modifying a criterion “by rule”, and the second sentence should be stricken.

- (2) If, on the other hand, the ch. NR 119 process is intended to be merely another means by which a site-specific criterion may be established, in s. NR 102.06 (7) the first and third sentences could be combined along the following lines: “A criterion contained within this section may be modified for a specific surface water segment or waterbody either by the procedures established in ch. NR 119 or by rule, using the standards described in this subsection”.

#### **5. Clarity, Grammar, Punctuation and Use of Plain Language**

a. In proposed s. NR 119.03 (intro.), the agency could consider whether to replace the phrase “SCC that is less stringent than the statewide phosphorus criterion” with the defined term “less stringent SCC”. Doing so could aid clarity given that the phrase “less stringent” on its own is not separately defined. This same issue arises in proposed s. NR 119.04 (intro.) regarding “SCC that is more stringent than the statewide phosphorus criterion”.

b. The agency should review proposed s. NR 119.06 (3) (a) 3. for clarity. For instance, what does it mean for a site to be “more variable than typical” or “close to the statewide phosphorus criterion? Can those values be quantified or qualified in any manner? In addition, what does it mean to state that the agency “recommends more frequent sampling”? Is it really a recommendation, or rather a requirement? Will a requestor know what amount of sampling is “more frequent” without consulting the agency?

c. In proposed s. NR 119.06 (6) (a) (intro.) and (a) 2., the term “SCC extent” appears. For clarity, the agency should consider either defining the term or replacing it with “extent of the study area that is eligible for the SCC”.